

1993

# State of Utah v. Larry D. Person : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :

Plaintiff/Respondent : Case No. 930059-CA

VS. :

LARRY D. PERSON : Priority No 2

Defendant/Appellant. :

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BRIEF OF APPELLANT

---

Appeal from the Denial of a Motion to Modify  
A Judgment After a Plea of  
Guilty to One Count of Theft, A Third Degree Felony  
In Violation of Sections 76-6-404 and 76-4-412 UCA  
before the Honorable Michael J. Glasmann, Judge  
in the Second Judicial District

**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 930059

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**FILED**

JUN 12 1995

**COURT OF APPEALS**

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JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a denial of the Defendant's motion to modify a judgment of the Second Judicial District Court, County of Weber, State of Utah rendered by the Honorable Michael J. Glasmann dated the 9th day of January, 1993. The Defendant was originally charged with theft in violation of Section 76-6-404 UCA and Section 76-6-412 UCA in that the Defendant allegedly exercised unauthorized control over property of a value of less than \$250.00 belonging to Mervyn's Department Store with the purpose to deprive the owner thereof, and said Defendant had been twice previously convicted of any theft, robbery or burglary with intent to commit theft. On the advice of Counsel the Defendant plead guilty to the one count of theft, and on the 21st day of October, 1992 was sentenced to serve a term of 0 to five years at the Utah State Prison. The Defendant, pro se, filed a motion to modify the judgment of the Court, which was denied by Judge Glasmann on the 9th day of January, 1993 as being frivolous. The Defendant filed, pro se, an appeal of the said denial of the motion for modification

of judgment, which appeal was assigned to the Court of Appeals as Case Number 930059-CA. Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals pursuant to Utah Code annotated, 78-2-2(3)(i) (1953 as amended) and Rule 26 of the Utah Rules of Criminal Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Did the Trial Court abuse its discretion by denying the Defendant's motion for modification of a judgment, wherein the Defendant was sentenced to serve a term of 0 to five years at the Utah State Prison, for theft of property of a value of less than \$250.00 where it was alleged that the Defendant had previously been convicted of theft. The Court in entering the sentence relied on the prosecution's allegations that the Defendant had twice been convicted of theft, robbery or burglary involving intent to commit theft as alleged. Counsel for the Defendant did not verify whether the Defendant, had in fact, been twice convicted of theft, robbery or burglary involving intent to commit theft.

Standard of Review Where a Defendant voluntarily enters a plea of guilty to a charge, the reviewing court will give substantial deference to the decision of the Trial Judge. State v. Callahan 866 P 2d 590 (Utah App 1993)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Annotated Section 76-6-404

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Annotated Section 76-6-412

(1) Theft of property and services as provided in this chapter shall be punishable:

- (a) as a felony of the second degree if the:
  - (i) value of the property or services exceeds \$1,000;
  - (ii) property stolen is a firearm or an operable motor vehicle;
  - (iii) actor is armed with a deadly weapon at the time of the theft;
  - (iv) property is stolen from the person of another;
- (b) as a felony of the third degree if the:
  - (i) value of the property or services is more than \$250 but not more than \$1,000
  - (ii) actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft;
  - (iii) property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry;
- (c) as a class A misdemeanor if the value of the property stolen was more than \$100 but does not exceed \$250, or
- (d) as a class B misdemeanor if the value of the property stolen was \$100 or less.

(2) Any person who has been injured by a violation of Subsection 76-6-408(1) may bring an action against any person mentioned in Subsection 76-6-408(2) d) for three times the amount of actual damages if any sustained by the plaintiff, costs of suit and reasonable attorneys fees.

#### STATEMENT OF FACTS

The Defendant, by information, was charged with theft in violation of Section 76-6-404 UCA, wherein it was alleged that he exercised unauthorized control over the property of Mervyn"s, to wit: a pair of shoes with a retail value of \$55.00. On September 30, 1992 the Defendant appeared before the Honorable Michael J. Glasmann for a pre-trial hearing. The Defendant had previously pled not guilty to the information. (T. P. 2)

At the preliminary hearing, counsel for Defendant indicated to



the Court that the Defendant had negotiated a settlement of the matter. The Defendant would plead guilty to the charge in consideration of which the State, through Mr Decaria, would make no sentencing recommendations. The State did, however, reserve the right to comment on Mr. Person's prior record. (T. P. 2)

The Court then asked the Defendant if he understood the agreement and asked if he was going to plead guilty as charged to a third degree felony, theft. The Court reviewed the State's agreement to make no recommendations as to what the Defendant's sentence should be, reserving the right to comment on the Defendant's previous criminal record, if they chose to do so. The Defendant told the Judge he understood that this correctly represented the plea bargain, and also that there had been nothing else represented to him, which had not been explained to the Court. (T. P. 2)

The Trial Judge explained to the Defendant that he was presumed innocent and the State has the burden of proving the Defendant guilty beyond a reasonable doubt. The Court explained that the State must prove that the Defendant committed a theft in that he obtained or exercised unauthorized control over the property of Mervyn's shoes, to wit: shoes of a value of less than \$250.00 with a purpose to deprive the owner thereof, and also that the Defendant had been twice previously convicted of any theft, robbery or burglary with intent to commit theft. The Defendant acknowledged that he knew the elements of the crime that the State would have to prove against him. (T. P. 4)

The Defendant stated he walked in, put on a pair of shoes and walked out. The Court then explained to the Defendant the maximum penalty for the third degree felony was zero to five years imprisonment in the Utah State prison and up to a \$5,000.00 fine. (T. P. 5). The Defendant pled guilty to the third degree felony, theft, committed on May 17, 1992. (T. P. 5) The Court accepted the Defendant's voluntary plea of guilty (T. P. 6)

On the 21st day of October, 1992 the Defendant appeared before the Court for sentencing. (Sentencing T. P. 2) The Defendant requested John Caine of the Weber County Public Defenders Association to represent him at the sentencing hearing. (Sentencing T. P. 2) Mr. Caine indicated that he had talked to the Defendant and explained that the sentencing Judge had limited ability to change much of what's was recommended in the pre-sentence report. He also explained that the recommendation for prison was a result of the Defendant's prior record. (Sentencing T. P. 3)

The Court in sentencing the Defendant stated:

"Your past record does box the Court in. It will be the sentence of the Court that you serve zero to five years at the State prison. (Sentencing T. P. 5)

#### SUMMARY OF ARGUMENT

The Trial Court committed reversible error in denying as frivolous the Defendant's pro se motion to modify his sentence. The Defendant received ineffective assistance of counsel when trial counsel advised the Defendant to plea guilty to theft, a third degree felony enhanced by two prior convictions of theft, burglary or attempted theft, where Counsel did not, in fact, verify that the

Defendant had been previously convicted twice of the offenses.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE  
ERROR IN DENYING THE DEFENDANTS  
MOTION TO MODIFY HIS SENTENCE  
OF IMPRISONMENT OF ZERO TO FIVE YEARS FOR THEFT OF  
TENNIS SHOES OF A VALUE OF \$55.00

The Defendant filed a motion to modify his sentence of zero to five years for theft, a third degree felony under Section 76-6-612 UCA. The Defendant was charged by information with third degree felony, theft in violation of Sections 76-6-404 and 76-6-412 UCA in that the Defendant obtained or exercised unauthorized control over the property of Mervyn's Store, to wit: shoes of a value less than \$250.00 with a purpose to deprive the owner thereof, and said Defendant had been twice previously convicted of any theft, robbery or burglary with intent to commit theft.

The Weber County Public Defenders was appointed as counsel for the Defendant and after visiting with counsel, the Defendant pled guilty to the charge. In the sentencing hearing the Defendant requested that John Caine, a Weber County Public Defender, stand with him at sentencing.

At sentencing the Defendant was again informed that he was being sentenced for a third degree felony, theft of shoes. (T. Sentencing Hearing P. 2) Further, Mr. Caine stated that, except for his prior convictions, he likely would not facing the recommendations presented to the sentencing court. (T. Sentencing Hearing P. 3) The sentencing Judge also explained to the Defendant

that because of his prior record of theft he was boxed in. On October 21, 1992 the Defendant was sentenced to imprisonment of Zero to Five years at the State prison. (T. Sentencing Hearing P. 5.) The Defendant did not move to withdraw his guilty plea within the statutory time.

Sometime prior to 9 January, 1993 the Defendant filed a motion with the District Court for modification of his judgment, which motion was denied on the 9th day of January, 1994. The Defendant filed pro se his notice of appeal of the denial of his motion to modify the judgment, alleging first, that he did not know at the time he entered his plea of guilty that he was being charged with a third degree felony. Second, the Defendant stated that he was arbitrarily charged with a Third Degree Felony. Third, the Defendant alleged that he was charged under the wrong section of the Utah Code and that he should only have been charged with petit theft, a misdemeanor. Fourth, the Defendant alleged that he was denied effective assistance of counsel in that counsel did not explain to him what he was charged with and the possible sentence if he pleaded guilty to the information. Fifth, that Defendant said the prior convictions were not proven in court, and that he was consequently sentenced for based on charges not proved in violation of Due Process of Law. Sixth, the Defendant asserted the enhancement penalties cannot be imposed until after he has been convicted of theft. Finally, the Defendant states that it is cruel and unusual punishment to sentence the Defendant as a habitual criminal.

For purposes of this appeal, Counsel will address only those points raised which bear upon of issue of ineffective assistance of counsel, there being no other substantial arguments, not previously settled by case law. The Sixth amendment to the United States Constitution stated that "[I]n all criminal prosecutions, the accused shall enjoy the right to -- have assistance of counsel for his defense" U. S. Const. Amend VI This right has interpreted by the United States Supreme Court to mean " the right to effective assistance of counsel". McMann v. Richardson 397 U. S. 759, 771 n. 14, 90 S. Ct. 1441, 1449 n. 14, 25 L. Ed 2d 763, 770. The same Court has established a two-part test for determining whether criminal defendant's have been denied their Sixth Amendment right as follows:

" First, the Defendant must show that counsel's performance was deficient. The requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. The requires showing the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington 466 U.S. 668, 687, 104 S. Ct. 2052, 2964, 80 L. Ed 2d 674 (1984) Accord State v. Templin 805 P. 2d 182, 186 (Utah 1990)

In order to satisfy the first prong of the Strickland test, a defendant "must show that counsel's representation fell below an objective standard of reasonableness: 466 U. S. at 688, 104 S. Ct. at 2064. However, in making such an analysis, "this court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect. State v. Tenneyson 850 P. 2d 461, 465 (Utah App 1992) See also Strickland. 466 U.S. at 689, 194 S. Ct. at 2065. In addition, "[o]nce a defendant proves that counsel's performance failed the reasonableness test, as measured by prevailing professional standards, he can meet the prejudice prong only by showing there is a reasonable probability that "but for counsel's

unprofessional errors, the result of the proceeding would have been different." Tennyson 850 P. 2d at 466 (quoting Strickland 466 U. S. at 694, 104 S. Ct. at 2068). Where the claim of ineffective assistance of counsel is raised for the first time on direct appeal, "we must decide whether defendant was deprived of the effective assistance of counsel as a matter of law." Tennyson 850 P. 2d at 466. See also State v. Ellifritz 835 P. 2d 170, 175 (Utah App 1992) State v. Callahan 866 P. 2d 590 (Utah App 1993)

This Court in the case of State v. Anderson 797 P. 2d 1114 (Utah App 1990) held that to rely on prior convictions the State must furnish copies of the convictions. It is not sufficient for the Court to rely on unverified transcripts or records, which may or may not be accurate.

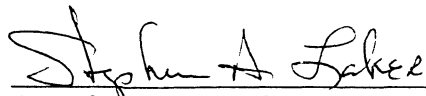
Counsel for the Defendant, in recommending that the Defendant plead guilty to a third degree felony, theft relied on a so-called "rap sheet", which purportedly showed the Defendant's prior convictions. At no time did the trial counsel, in fact, verify that the information on the rap sheet was in fact accurate. Trial counsel was relying solely on information furnished by the prosecutor as to his prior convictions.

The Defendant's counsel's performance in recommending that the Defendant plead guilty to theft, a third degree felony was deficient. If the records were inaccurate and the Defendant had not twice been previously convicted of either theft, burglary or robbery with an intent to commit theft, then the Defendant was not guilty of a third degree felony. Absence any evidence showing that trial counsel in fact verified the prior convictions he should not have recommended the Defendant plead guilty to the information as charged.

CONCLUSION

The trial judge committed reversible error in denying the Defendant's motion for modification of his sentence, where the Defendant received ineffective assistance of counsel in making his plea of guilty to a third degree felony, theft with two prior convictions of theft, burglary, or robbery with intent to commit theft, where said counsel had not verified that the Defendant had twice been so convicted.

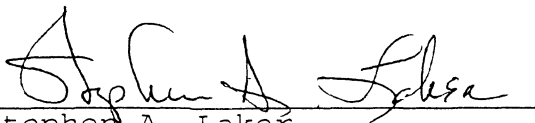
RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of June, 1995



Stephen A. Laker  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed one true and correct copy of the above and foregoing Brief to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid this 8<sup>th</sup> day of June, 1995.



Stephen A. Laker  
Attorney for Appellant

## **ADDENDUM**



1 THE COURT: State of Utah vs. Larry D. Person, case  
2 0449. Time for Pre-Trial, and our trial having been set for  
3 October the 9th.

4 MR. FROERER: Your Honor, we have a negotiated  
5 settlement of this matter. Mr. Person is going to plead  
6 guilty to the charge. The State, through Mr. Decaria, is  
7 going to make no sentencing recommendation, though he does  
8 reserve the right to comment on Mr. Person's prior record.

9 THE COURT: Anything else?

10 MR. FROERER: That's it.

11 THE COURT: Is that the State's understanding?

12 MR. DAINES: That's correct, your Honor.

13 THE COURT: Mr. Person, you have heard that  
14 representation, that you are going to plead guilty as charged  
15 to the third degree felony, theft. That the State agrees to  
16 make no recommendation as to what your sentence should be, but  
17 does reserve the right to comment on your previous criminal  
18 record if they so choose. You understand that that is the  
19 plea bargain?

20 MR. PERSON: Yes, I do.

21 THE COURT: Is there anything else that's been  
22 represented to you that has not been disclosed here?

23 MR. PERSON; No.

24 THE COURT: All right. Do you have a clear mind  
25 today?

1 right to appeal from anything that might have occurred during  
2 that trial?

3 MR. PERSON: Yes.

4 THE COURT: In this case you are presumed innocent.  
5 The State has the burden of proving your guilty, as I have  
6 said, beyond a reasonable doubt. The State has alleged, and  
7 must prove in this case, that you committed a theft. That you  
8 obtained or exercised unauthorized control over the property  
9 of Mervyn's Shoes, to wit, shoes, of a value less than \$250.00  
10 with a purpose to deprive the owner thereof. And that you  
11 have been twice previously convicted of any theft, robbery or  
12 burglary with intent to commit theft.

13 Is that correct, Mr. Daines?

14 MR. DAINES: Yes, that's correct, your Honor.

15 THE COURT: Do you understand that those are the  
16 elements the State would have to prove against you?

17 MR. PERSON: Yes, I do.

18 THE COURT: Are you pleading guilty in this case  
19 because you in fact committed the theft?

20 MR. PERSON: Yes, I am.

21 THE COURT: Tell the Court what happened briefly if  
22 you would.

23 MR. PERSON: Well, I walked in and put on a pair of  
24 shoes and walked out.

25 THE COURT: All right. Do you understand that the

1 maximum penalty for the third degree felony is zero to five  
2 years in the Utah State Prison and up to \$5,000.00 in fines?

3 MR. PERSON: Yes, I do.

4 THE COURT: You understand that notwithstanding  
5 what's been said or represented to you, that it is up to the  
6 Court to sentence you. And the Court can sentence you to the  
7 maximum penalty?

8 MR. PERSON: Yes.

9 THE COURT: Okay. At this time do you need any more  
10 time to think about this, or to consult with your attorney?

11 MR. PERSON; No, I don't.

12 THE COURT: As to the third degree felony, theft,  
13 alleged to have been committed on May 17, 1992, how do you  
14 plead?

15 MR. PERSON: Guilty.

16 MR. FROERER: I do have a statement, your Honor.

17 THE COURT: Pardon?

18 MR. FROERER: We do have a statement.

19 THE COURT: Very good. If you will approach the  
20 Bench, Mr. Froerer.

21 Your attorney, Mr. Person, has provided me with a  
22 Statement of Defendant in Advance of Plea of Guilty. Has your  
23 attorney been over that with you?

24 MR. PERSON: Yes, he has.

25 THE COURT: He explained it to you?

1 MR. PERSON: Yes, he did.

2 THE COURT: It appears to contain the signature of

3 Larry Person. Is that your signature on page five?

4 MR. PERSON; Yes, it is.

5 THE COURT: All right. The Court will find that you

6 knowingly and voluntarily entered your plea of guilty.

7 I want to advise you, as I have previous Defendants, that

8 you have 30 days from today within which to bring a Motion to

9 Withdraw your Plea of Guilty. It doesn't mean the Court will

10 grant it, but if you don't bring it within that 30 days, it is

11 not timely. Do you understand that?

12 MR. PERSON: Yes, I do.

13 THE COURT: All right. This matter needs to be set

14 for sentencing. The Probation Office looking for three weeks?

15 PROBATION OFFICER: Yes, your Honor.

16 MR. FROERER: Your Honor, he is requesting sooner

17 than that.

18 THE COURT: Let me ask this question: Do we have

19 any--have you ever been on probation before this Court

20 previous to this?

21 MR. PERSON: Yes, I have.

22 THE COURT: How long ago?

23 MR. PERSON: Quite a while ago. I have been on

24 parole, though.

25 MR. DAINES: That's what partially complicates this

1 THE COURT: State of Utah vs. Larry Person, case  
2 0449

3 MR. GRAVIS: Your Honor, I was prepared to go on Mr.  
4 Person, but he indicates he wanted to talk to John about it,  
5 too, so we will have to pass that.

6 THE COURT: This is on for sentencing. We will pass  
7 that.

8 MR. GRAVIS: Yes, your Honor.

9 \* \* \*

10 THE COURT: Mr. Caine, did you have a chance to talk  
11 to Mr. Person?

12 MR. CAINE: I did. We can do that now.

13 THE COURT: Case 0449, State vs. Larry Person.

14 MR. CAINE: This is Mr. Person. This is actually  
15 Mr. Froerer and Mr. Miles' case, but I have--if you go back to  
16 the beginning on page 4, I have known Mr. Persons since about  
17 1979. So I have had something to do with the rest of those  
18 cases, so he wanted me to stand up here with him.

19 THE COURT: All right. Well, this is the time for  
20 sentencing on the third degree felony, theft, charge. Is  
21 there any legal reason why sentence should not be imposed?

22 MR. CAINE: There is none.

23 THE COURT: Do you wish to speak to this matter?

24 MR. CAINE: Yes, in this respect, Judge, I have  
25 talked with Larry and indicated to him that you have very

1 limited ability to change much of what's recommended here in  
2 this report. And that's primarily based upon his prior  
3 record.

4 The one thing that's a little troubling to me frankly is  
5 that if you go back to Larry's release from prison the last  
6 time, which was in May of 1990, he was basically on intensive  
7 supervision type parole from that point in time until June of  
8 1992. That was actually the best period of time that he has  
9 had probably in the last 15 years. I was a little  
10 disappointed that Ms. Vincent did not detail that in a little  
11 more detail in her report because in effect he had no  
12 violations in that period; did well, worked, and was doing  
13 pretty well.

14 What happened is, which has been a pattern in his life  
15 unfortunately, this locks it right in, he is obviously  
16 starting to use heroin again. And then we have the theft.  
17 That's been Larry's Achilles' heel unfortunately is his use of  
18 heroin. The theft is a \$55.00 pair of sneakers, which as I  
19 have indicated to him if he were standing here the first time,  
20 we wouldn't be standing here because that would be a  
21 misdemeanor. But he is burdened of course with his past.

22 The problem is he will be sent back down to prison, if  
23 that's the sentence, given a parole date, because he is not  
24 the kind of guy that does badly down there, and the problem  
25 still doesn't get cured. And that is, he has a substance

1 If the person wants to go through any kind of a rehab pro  
2 at the prison, those are made available to him. For those  
3 people who want to get off those substances down there, I  
4 think they have effective programs.

5 MR. CAINE: And let me just say what Mr. Daines  
6 theoretically is true. The problem is that the programs  
7 still obviously administered within the confines of the  
8 prison. It is not a situation where you get released. And  
9 there are some problems incumbent in that sort of situation  
10 because of the drug problem that exists at the prison. That is  
11 not the most conducive place to do it. But he is correct that  
12 there are programs available. I just don't think they are  
13 very successful.

14 THE COURT: Mr. Person, I can imagine you might  
15 better under intensive supervision because you are being  
16 followed and watched closely. That may be an incentive that  
17 causes you to behave better. And that may be why you perform  
18 better under that situation.

19 Unfortunately, our society is not set up for you to  
20 intensively supervised the rest of your life to avoid slipping  
21 back into the heroin problem or committing thefts.

22 Your past record does box the Court in. It will be the  
23 sentence of the Court that you serve zero to five years at the  
24 State Prison. And that you pay restitution in the amount of  
25 \$55.00. It will be the further order of the Court that you be